

April 9, 2004

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

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REPORT AND DECISION ON REASONABLE USE EXCEPTION APPEAL

SUBJECT: Department of Development and Environmental Services file no. **L02SAX08**

KIRKLAND BUILDERS GROUP

Reasonable Use Exception Appeal

Location: Lot C located east of property addressed as 6040 Northeast 135th Street,
Kirkland

Appellant: **Mark Kuryla**
13603 62nd Avenue Northeast
Kirkland, WA 98034
Telephone: (425) 204-0536

Applicant: **Mike Nykreim**
Kirkland Builders Group
101 – 10th Avenue
Kirkland, WA 98033
Telephone: (425) 466-2611

King County: Department of Development and Environmental Services, *represented*
by **Chad Tibbits**
900 Oakesdale Avenue Southwest
Renton, Washington 98055-1219
Telephone: (206) 296-7194
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SUMMARY OF DECISION/RECOMMENDATION:

Department's Preliminary Recommendation:	Deny appeal
Department's Final Recommendation:	Deny appeal
Examiner's Decision:	Deny appeal

EXAMINER PROCEEDINGS:

Hearing Opened:	April 2, 2004
Hearing Closed:	April 2,
2004	

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

FINDINGS OF FACT:

1. Kirkland Builders Group has filed variance and reasonable use exception applications on two contiguous lots on Northeast 135th Street located in the Holmes Point area north of Kirkland and south of Kenmore. Lot B is the westerly of the two parcels and is subject to the variance application while Lot C to its east has requested a reasonable use exception. Both lots are bisected by a Class 2S stream and its associated Class 3 wetland with the consequence that the entirety of both lots are occupied by sensitive areas and their regulatory buffers. Road access to the two lots lies on their south side via Northeast 135th Street, although the northeast corner of Lot C also nearly has access to 62nd Avenue Northeast. Both lots are wooded and currently undeveloped.
2. A reasonable use exception was issued by King County DDES on December 1, 2003 for Lot C based on the fact that the proposed residence thereon not only is situated within the regulatory buffers but its north side impinges upon the Class 3 wetland itself. Reduction of a sensitive areas buffer can be authorized by a variance approval, but encroachment onto a wetland or stream proper requires a reasonable use exception. On December 12, 2003 DDES issued a variance approval for Lot B authorizing residential development within the wetland and stream buffers. The two decisions were appealed by neighborhood resident Mark Kuryla, whose property adjoins both Lots B and C along their northern boundaries. Because substantially the same issues were raised within both appeals, the two appeal hearings were consolidated into a single proceeding.
3. A pre-hearing conference was held upon the conjoined appeals on February 19, 2004 and a pre-hearing order issued on February 23, 2004. The issues identified within the pre-hearing order relate to the potential effects from residential development on an older dam lying upstream of Lot C at its eastern boundary, potential siltation and pollution impacts to the stream and wetland system from site preparation and construction, potential habitat loss, and the effects of increased traffic and vehicles on the already cramped private road system servicing Northeast 135th Street. The reasonable use exception appeal also raised a question of whether the Applicant has available reasonable alternative development uses for Lot C that would be less impactive to the environment.
4. Lot B encompasses 9,652 square feet with a residential footprint proposed at 1,932 square feet. The residence and garage are supported by an entry and deck area of 194 square feet and 353 square feet of driveway, for a total impervious area of 2,479 square feet. Lot C has a lot area of 8,652 square feet, a house and garage footprint of 1,420 square feet, 236 square feet of proposed deck and 522 square feet of proposed driveway, for a total impervious area of 2,178 square feet. For both lots mitigation of sensitive areas impacts is proposed to occur onsite within the wetland and its buffer in the form of removal of invasive plant species and their replacement with native varieties. Most of the mitigation effort will occur on the north side of the Class 2 stream away from residential construction.
5. Appellant Mark Kuryla has raised relevant concerns with respect to proposed residential development on Lots B and C, but has produced little in the way of solid evidence in support of his position. He submitted to the record a somewhat vague and generic letter from a civil engineer which suggests that the proximity of the Lot C residence to the older dam adjacent to

the east might have a destabilizing effect. In response the Applicant has offered to perform a geotechnical review of the siting and foundation plans for the two residences to determine if any risk to off-site properties will result from proposed construction. A condition to such effect will be added to the two DDES decisions. Mr. Nykreim of Kirkland Builders Group also pointed out the obvious fact that if this older dam is at risk of failure in its present state, the responsibility for correcting such condition lies with the dam's owner and not with downstream properties that may be threatened by its failure.

6. The stream that runs through Lots B and C is presumed under County regulations to be Class 2 with salmonids based on its flow characteristics. There is no actual evidence, however, of fish usage of this creek, and in view of development patterns downstream including blockages, it would be surprising if it were indeed subject to fish usage. It long has been landscaped, overrun by invasive plants and subject to water quality impacts from existing development. While construction on the highly constrained Lot B and C sites needs to be mitigated against release of sediment-laden flows, there is little likelihood that the stream will suffer as a consequence of the Applicant's projects significantly greater environmental abuse than it currently experiences. There is no reason to suppose that the County's mandatory drainage and erosion sedimentation control measures will not be adequate to reduce impacts to the stream and wetland to an acceptable level.
7. Finally, while Mr. Kuryla and a number of other neighbors have expressed concern that the additional traffic on Northeast 135th Street will further impact an already tight private roadway, it would seem that the amount of traffic generated by two new residences would be less of an issue than loss of streetside parking. Both of the new residences themselves will have adequate off-street parking to meet code requirements, and the other residences in this neighborhood have no vested right to the use of the shoulder along lots B and C for overflow parking. Again, while Mr. Kuryla has made allegations of serious problems existing in this realm, he has submitted nothing specific to the record in support of his position.

CONCLUSIONS:

1. The requirements for granting a reasonable use exception are stated at KCC 21A.24.070 B1 and recited within the DDES December 1, 2003 report and decision. These code requirements are expanded and refined within section 22 of Public Rule 21A-24, issued by DDES on May 4, 2000 and amended July 19, 2002. Of particular importance to our review are the provisions within Rule 21A-24-022 C specifying that structures requiring a reduction of sensitive areas buffers be located as far from the sensitive area as practical and that for single-family residential development on parcels of less than 30,000 gross square feet "no more than 3,000 square feet of the site may be disturbed by structure or other land alteration."
2. It is not disputed that the application of County sensitive areas requirements to the Lot C parcel would preclude all reasonable use of the property. All the upland buildable areas on the lot are encumbered by wetland and stream buffers. Moreover, with the exception of specified facilities for general public or utility use, permitted uses within the R6 zone are largely limited to residential development. Construction of a single-family development on Lot C is the least impactive reasonable use of the property permitted under the zoning.
3. The question of whether the Applicant's proposed residential development poses an unreasonable threat to the public health, safety or welfare as alleged by the Appellant focuses

primarily upon the relationship between the building site and an older private dam located just upstream from Lot C on the adjacent parcel. Although the record is devoid of any competent technical analysis, there are general suggestions that residential construction so close to the base of the dam could destabilize the structure and cause it to slide. In response to this concern the Applicant has offered to perform a geotechnical study of the impacts of the proposed residence on off-site properties, including specifically the adjacent dam to the east. A condition incorporating this requirement has been appended to the decision. As argued by the Applicant, the converse proposition that the dam itself is at risk of failure in its present condition and therefore a threat to potential downstream development is not a basis for denying a reasonable use exception. It is the responsibility of the upstream property owner to maintain the non-conforming dam structure in a safe condition; failure to do so does not constitute legal grounds for denying development permit applications on adjacent parcels.

4. Other potential threats to the public health, safety and welfare have been alleged but not substantiated by the Appellant. Certainly, erosion and sedimentation control measures must be in place on Lot C at the time of site clearing and construction. These are required by code and one must assume that the Applicant will implement them in a timely and effective manner. Moreover, despite its presumptive Class 2S designation, the stream that crosses the Lot C property historically was intensively manipulated by other property owners prior to the enactment of sensitive areas regulations and cannot be described as a pristine natural feature. Thus while erosion and sedimentation impacts to the wetland and stream are to be avoided insofar as reasonably possible, minor releases to these disturbed features are not likely to result in an environmental disaster. No contrary evidence as to such impacts was introduced to the hearing record by Mr. Kuryla, and the Appellant has not sustained his burden of proof to demonstrate that unacceptable impacts would be likely to occur.
5. The Applicant has proposed to construct a residential bottom story, a garage, a driveway and entry areas within a building envelope slightly greater than 2,000 square feet and at a location as far as possible from the stream and wetland. The disturbance area is well below the maximum allowed within the DDES public rule and is as far removed from the sensitive areas as feasible. The proposed alterations to the sensitive area would therefore be the minimum necessary to allow for reasonable use of the property. In addition, a mitigation plan has been submitted for compensatory removal of invasive species within the wetland and its buffer and for native vegetation plantings. This will provide the mitigation program required by code to compensate for sensitive areas impacts.
6. The proposed residential construction on Lot C will lie entirely within required stream and wetland buffers, and the northern edge of the development envelope will impinge upon the wetland itself. Because the proposed development envelope is the minimum necessary to provide for reasonable use of the property comparable to existing development within the neighborhood and as permitted by the zoning, the record establishes that reasonable use of Lot C cannot be effected through the variance procedure alone and a reasonable use exception is necessary.

DECISION:

The appeal is DENIED.

ORDER:

1. Development shall be in accordance with the site plan prepared by Architects Northwest and annotated by DDES (Exhibit no. D-16 within the December 1, 2003 DDES decision), except as modified below and as further approved through the building permit review process. No portion of any structure shall be closer than 10 feet to the Class 2 S stream.
2. The development of this project is subject to all rules, regulations, policies, and codes that are not specifically modified by this approval.
3. All conditions attached to the building permit application shall also be considered conditions of approval for this reasonable use exception. A King County Senior Ecologist shall be notified in advance of clearing on the site, and be present on site to assure that no more than the minimum necessary clearing takes place.
4. A copy of the December 1, 2003 DDES RUE decision shall be kept on-site during construction at all times.
5. RUE approval shall be implemented through issuance of a building permit within two years of the effective date of this approval. Failure to obtain a building permit within the prescribed time period shall be cause for this approval to become null and void.
6. The impact area will be as shown on Exhibit D16. No extensions further into the buffer or wetland will be allowed. This impact area will accommodate a 5-foot building setback line and the structure.
7. Mitigation, as described in the revised plan submitted on March 7, 2003 by CAi Cantrell & Associates, to enhance all remaining areas of wetland and buffer, must be installed prior to final occupancy for a building permit.
8. A financial guarantee for the mitigation project shall be posted prior to issuance of the building permit.
9. All areas outside of the 5-foot building setback shall be permanently fenced prior to finalizing the building permit.
10. Twenty linear feet of driveway shall be provided between the garage and the street property line (KCC 21A.12.030(8)).
11. Prior to issuance of a building permit, the owner shall file with the Records and Elections Division a Notice on Title approved by King County that depicts the on-site sensitive areas and buffers.
12. Prior to building permit approval the Applicant shall submit to DDES a geotechnical review performed by a licensed engineer analyzing the Applicant's siting and foundation plans for their potential adverse effects to adjacent properties. If adverse effects are identified, the Applicant shall modify the proposal to eliminate or mitigate for such effects, as approved by DDES.

ORDERED this 9th day of April, 2004.

Stafford L. Smith
King County Hearing Examiner

TRANSMITTED this 9th day of April, 2004, to the following parties and interested persons of record:

Tanya Allison
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Kirkland WA 98034-1625

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Cass Newell
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NOTICE OF RIGHT TO APPEAL

The action of the hearing examiner on this matter shall be final and conclusive unless a proceeding for review pursuant to the Land Use Petition Act is commenced by filing a land use petition in the Superior

Court for King County and serving all necessary parties within twenty-one (21) days of the issuance of this decision.

MINUTES OF THE APRIL 2, 2004, PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. L02SAX08 & L02VA014.

Stafford L. Smith was the Hearing Examiner in this matter. Participating in the hearing were Chad Tibbits and Betsy MacWhinney, representing the Department; Mark Kuryla, the Appellant; and Mike Nykreim, representing the Applicant.

The following exhibits were offered and entered into the record:

- Exhibit No. 1 DDES Reasonable Use Exception Report and Decision File No. L02SAX08
Dated December 1, 2003
- Exhibit No. 2 DDES Variance Report and Decision File No. L02VA014 dated December 12, 2003
- Exhibit No. 3 DDES Supplemental Report to the Hearing Examiner
- Exhibit No. 4 DDES File No. L02SAX08
- Exhibit No. 5 DDES File No. L02VA014
- Exhibit No. 6 Letter to DDES from Thomas Kane dated March 10, 2004
- Exhibit No. 7 Two statements from Joy Dettmer to the Hearing Examiner dated March 24, 2004
- Exhibit No. 8 Letter to Kirkland Builders Group from Goldsmith & Associates dated
March 25, 2004
- Exhibit No. 9 Email from Don Gauthier to Chad Tibbits dated March 30, 2004

SLS:gao
L02VA014 RPT